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REVIEW OF THE WORK OF THE SUB-COMMISSION

Working paper prepared by the secretariat on the question of the reform of the procedure governed by Economic and Social Council resolution 1503 (XLVIII)

1. By decision 1993/104 of 12 August 1993, the Sub-Commission on Prevention of Discrimination and Protection of Minorities decided to study the question of the reform of the procedure governed by Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970, including the possible abolition of that procedure, at its forty-sixth session, under item 3 of its provisional agenda, and requested the secretariat to prepare a working paper on the subject and to obtain the opinion of the United Nations Legal Counsel on the interpretation to be given to paragraph 10 of resolution 1503 (XLVIII). The resolution sets out the first United Nations procedure for dealing with communications relating to violations of human rights and fundamental freedoms. Paragraph 10 provides that the procedure should be reviewed "if any new organ entitled to deal with such communications should be established within the United Nations or by international agreement".

2. The present document constitutes the working paper requested by the Sub-Commission. The opinion of the Legal Counsel will be issued separately in an addendum to the present document.

3. In addition, documents E/CN.4/1317 (relating to the initial review of the 1503 procedure) and E/CN.4/1994/42 (concerning the functioning of the various treaty based and non-treaty based procedures) may be considered

relevant and will be made available to the members of the Sub-Commission in the context of the present exercise. To avoid overlapping and duplication of work, an effort will be made not to repeat here the text of these documents.

Initial review of the 1503 procedure

4. It may be worth recalling that, following the entry into force of the International Covenant on Civil and Political Rights in 1976, the Commission on Human Rights initiated a review of the 1503 procedure because a "new organ", the Human Rights Committee, had been established (in 1977) to deal with communications concerning violations of human rights under the procedure governed by the Optional Protocol to the Covenant. Thus, in resolution 16 (XXXIV), adopted on 7 March 1978, the Commission requested the Secretary-General to prepare an analysis of existing United Nations procedures for dealing with communications concerning violations of human rights, "to assist the Commission in studying measures to avoid possible duplication and overlapping of work in the implementation of these procedures".

5. The requested analysis, focusing on the coexistence of the 1503 procedure and the Optional Protocol procedure, was placed before the Commission the following year in document E/CN.4/1317. Apart from describing in some detail secretariat handling of communications received, the implementation of both procedures by the bodies concerned and the basic differences between the two procedures, the document sets out practical suggestions aimed at avoiding possible overlapping or duplication of work (E/CN.4/1317, paras. 30-36). When introducing the analysis, the Assistant Director of the then Division of Human Rights pointed out that the Human Rights Committee had already had occasion to determine that the 1503 procedure did not affect its work under the Optional Protocol. The former procedure was concerned with the examination of situations which appeared to reveal a consistent pattern of gross violations of human rights, while the latter procedure dealt with individual cases, on a case by case basis. The Assistant Director observed that, from the legal standpoint, there was no danger of conflict between the two procedures and that overlapping and duplication would be avoided by the measures suggested in the analysis prepared by the Secretary-General (E/CN.4/SR.1510, para. 7).

6. The records of the Commission do not reveal that there was any discussion of document E/CN.4/1317. In the absence of any objection, however, the secretariat has applied the measures suggested therein for avoiding overlapping or duplication for the past 15 years. Mutatis mutandis, the same working methods have been applied after the entry into force of other treaty based procedures for dealing with communications concerning violations of human rights, i.e. the procedure governed by article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (implemented by the Committee on the Elimination of Racial Discrimination) and the procedure governed by article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (implemented by the Committee against Torture). It may be mentioned that all of the procedures referred to above are regarded as confidential. The meetings of the implementing bodies are closed and the working documents are confidential. Under the treaty based procedures, however, all decisions of a final nature are made public.

Further measures relevant to the review of the 1503 procedure

7. In the course of the years, a number of public, non-treaty based procedures have been established, both thematic and country oriented, for the consideration of alleged human rights violations. These mandates, mostly established by the Economic and Social Council at the recommendation of the Commission on Human Rights, are entrusted to special rapporteurs, special representatives, independent experts and working groups which annually submit public reports to the Commission and, in some cases, to the General Assembly for consideration.

8. In recent years, it has been increasingly recognized that the reporting obligations under international treaties and the wide range of requests for information or clarifications, emanating from the various public or confidential procedures, has placed an onerous burden on many States, particularly developing countries. Attention has been drawn in this connection to the need to pay due attention to the possible simplification, rationalization and improvement of the methods of work of all existing procedures, while, at the same time, ensuring their effective functioning. It is in this context that the Commission on Human Rights, inter alia, bearing in mind that the 1503 procedure had been duly established for dealing with communications relating to allegations of human rights and fundamental freedoms, adopted resolution 1993/58 of 9 March 1993, in which it requested the Secretary-General to submit at its fiftieth session a report on:

(a) The original mandates assigned to the various treaty and non-treaty mechanisms established for the supervision, investigation and monitoring of the implementation of the provisions of international legal instruments and standards in the field of human rights;

(b) The international legal norms and standards on which existing non-treaty mechanisms now base their activities; as well as the conceptual framework, methods of work and procedural rules that each has deemed it advisable to apply in the discharge of its mandate;

(c) The various norms, criteria and practices established by each existing mechanism in regard to the admissibility of communications, as well as the preliminary consideration and evaluation of communications, their referral to the interested parties and the subsequent course followed in connection with them;

(d) The criteria used in practice by the Centre for Human Rights to channel communications either to existing public machinery or to bodies provided for in the confidential procedure governed by Economic and Social Council resolution 1503 (XLVIII), together with the legal foundation for such criteria.

9. The requested report, which gave an overview of the various existing mechanisms and the working methods used, was placed before the Commission at its fiftieth session in document E/CN.4/1994/42. It dealt in some detail with the coexistence of the 1503 procedure and a range of other procedures, treaty based and non-treaty based. Attention is drawn to paragraphs 50 to 58 of that

report (dealing with the origin and main features of the 1503 procedure), paragraphs 66 to 76 (dealing with the methods of work under the 1503 procedure) and 82 to 84 (dealing with the criteria used for determining whether a communication is channelled into the 1503 procedure or a public procedure), as well as to paragraphs 48 and 49 (dealing with the criteria for channelling communications into the 1503 procedure or a treaty based procedure).

10. At its fiftieth session, in resolution 1994/94, the Commission on Human Rights, taking note of the report submitted by the Secretary-General (E/CN.4/1994/42), decided that it should be considered in the course of the forthcoming rationalization of its work. The Commission requested that recommendations should be submitted with a view to improving the functioning, effectiveness, efficiency and coordination of the existing mechanisms and that specific recommendations be submitted so that the mechanisms could better carry out their work, while at the same time avoiding unnecessary duplication and waste of resources.

11. It may also be mentioned that in the Vienna Declaration and Programme of Action, adopted on 25 June 1993 by the World Conference on Human Rights and endorsed by the General Assembly on 20 December 1993 in its resolution 48/121, the World Conference recommended that:

> "the States parties to international human rights instruments, the General Assembly and the Economic and Social Council should consider studying the existing human rights treaty bodies and the various thematic mechanisms and procedures with a view to promoting greater efficiency and effectiveness through better coordination of the various bodies, mechanisms and procedures, taking into account the need to avoid unnecessary duplication and overlapping of their mandates and tasks" (part II, para. 88).

At the same time, the World Conference underlined the importance of preserving and strengthening the system of special procedures, rapporteurs, representatives, experts and working groups of the Commission on Human Rights and the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (Part II, para. 95).

12. From the foregoing it can be seen that considerable effort has already been invested, and continues being invested, in the review of existing procedures and mechanisms in this field, including the procedure for dealing with communications relating to violations of human rights and fundamental freedoms governed by Economic and Social Council resolution 1503 (XLVIII).

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THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The human rights dimensions of population transfer, including the implantation of settlers

Progress report prepared by Mr. Awn Shawhat Al-Khasawneh, Special Rapporteur

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Introduction

1. In resolution 1992/28 of 27 August 1992, the Sub-Commission entrusted Mr. Awn Shawkat Al-Khasawneh and Mr. Ribot Hatano, as Special Rapporteurs, with preparing a preliminary study on the human rights dimensions of population transfer, including the implantation of settlers and settlements, and requested them to examine, in the preliminary study, the policy and practice of population transfer, in the broadest sense, with a view to outlining the issues to be analysed in further reports, in particular the legal and human rights implications of population transfer and the application of existing human rights principles and instruments, and to submit the preliminary study to the Sub-Commission at its forty-fifth session.

2. This decision was endorsed by the Commission on Human Rights, at its forty-ninth session, in decision 1993/104 of 4 March 1993 and approved by the Economic and Social Council, by its decision 1993/288 of 28 July 1993.

3. In resolution 1993/34 of 25 August 1993, the Sub-Commission, at its forty-fifth session, took note with appreciation of the preliminary report on the human rights dimensions of population transfer, including the implantation of settlers and settlements (E/CN.4/Sub.2/1993/17 and Corr.1) submitted by Mr. Awn Shawkat Al-Khasawneh and Mr. Ribot Hatano, which found, inter alia, that population transfer is, prima facie, unlawful and violates a number of rights affirmed in human rights and humanitarian law for both transferred and receiving populations, and endorsed the conclusions and recommendations of the preliminary report. Furthermore, the Sub-Commission regretted that Mr. Hatano was unable to be further involved in the work on this subject as one of the Special Rapporteurs, and requested Mr. Al-Khasawneh, as Special Rapporteur, to continue the study on the human rights dimensions of population transfer, including the implantation of settlers and settlements and to submit a progress report on the question to the Sub-Commission at its forty-sixth session.

4. In the same resolution the Sub-Commission invited the Commission on Human Rights, at its fiftieth session, to request the Secretary-General to organize a multidisciplinary expert seminar prior to the preparation of the final report, in order to formulate appropriate final conclusions and recommendations. It also requested the Secretary-General to invite Governments, United Nations bodies and intergovernmental and non-governmental organizations concerned to provide the Special Rapporteur with information relevant to the preparation of his reports. It finally invited the Commission on Human Rights to request the Special Rapporteur to undertake on-site visits to diverse, ongoing cases of population transfer selected on the basis of information received for the next report.

5. At its fiftieth session, the Commission on Human Rights, noting Sub-Commission resolution 1993/34 adopted decision 1994/102 of 25 February 1994, in which it endorsed the resolution of the Sub-Commission.

6. On 29 March 1994 a note verbale and letter were sent to Governments, United Nations bodies and intergovernmental and non-governmental organizations concerned, in accordance with Commission decision 1994/102, to solicit

information relevant to the preparation of the reports. So far replies have been received from the following States: Cyprus, Latvia, Pakistan, Saudi Arabia; the following United Nations bodies: Economic Commission for Latin America and the Caribbean (ECLAC), Economic and Social Commission for Asia and the Pacific (ESCAP), International Research and Training Institute for the Advancement of Women (INSTRAW), United Nations Conference on Trade and Development (UNCTAD), United Nations Department for Development Support and Management Services, United Nations Development Programme (of Assistance to the Palestinian People), United Nations Fund for Population Activities (UNFPA), United Nations University; the following specialized and other agencies: Food and Agriculture Organization of the United Nations (FAO), International Labour Organisation, World Bank; the following intergovernmental organizations: Conference on Security and Cooperation in Europe, International Court of Justice, Organisation for Economic Cooperation and Development, and the following non-governmental organizations and other institutions: All Pakistan's Women's Organization, International Confederation of Midwives, Minority Rights Group, Palestinian Human Rights Information Centre, Syracuse University, The Tibet Bureau, University of Utrecht, Unrepresented Nations and People's Organization, World Federation of Free Latvians.

7. The Special Rapporteur wishes to acknowledge with gratitude the invitations extended to him to visit countries to appraise himself more fully of certain population transfer situations. He intends to do so, circumstances permitting, prior to the submission of the final report. Likewise, the Special Rapporteur wishes to take this opportunity to thank all those who have provided him so far with information. It is his intention to return in more detail to the wealth of information which these replies contained, in the preparation of his final report.

8. Further to the preliminary recommendations made by the Special Rapporteurs in their preliminary report, the aim of the present report is to examine in greater detail the legality of the issue of population transfer with the objective of elaborating criteria according to which the transfer of populations may be prohibited or justified. The mode of analysis of the subject matter at hand follows the perspective of international law, including the law of human rights, the law of armed conflict, and the law of State responsibility.

9. Part I of the report considers the normative structure of international law and human rights with respect to population transfers. It sets the legal context within which the treatment of population transfer is approached. Parts II and III examine the human rights dimensions of internal and international transfers of populations respectively, and includes, in this context, analysis of the standards pertaining to the legality of such population transfers. In part IV, brief consideration is given to the relation of economic, social and cultural rights to mass movements of populations. Population transfer under the Law of Occupation is discussed in part V, and part VI is devoted to the question of State responsibility and the movement of populations. Conclusions and Recommendations can be found in part VII.

I. HUMAN RIGHTS AND POPULATION TRANSFER: THE NORMATIVE STRUCTURE

10. In examining the human rights dimensions of population transfer, it is necessary at the outset to outline two issues which are important to the method of approach and analysis. The first requires a grasp of application of the essence of human rights and its significance to movement of populations. The second involves appreciation of the normative structure of international law and human rights within which specific human rights standards relating to population transfer apply.

11. As far as the first is concerned, the essence of human rights in international law can be portrayed as follows: firstly, it formulates general standards governing the conduct of States towards their own populations and other persons within State territory. In this sense, human rights define internationally acceptable standards to which methods of government ought to comply as a matter of conduct. By providing standards of conduct, human rights elaborate the basis for the protection by States of all persons in State territory, without discrimination, unless where and as specified. This means that human rights standards are useful to defining the conduct of States in the protection of populations against arbitrary displacement as well as in the course of displacement.

12. Secondly, by establishing standards governing the conduct of States, human rights constitute general standards of treatment of the population and persons within territories of States. This applies to the protection of persons or populations against or during population transfer.

13. Thirdly, the concept of "human rights standards" connotes a touchstone for gauging the performance of States in their obligations to respect and observe human rights. Several points emerge from this proposition: Human rights obligations are owed between States and unlawful conduct on the part of a State, such as a breach of human rights obligations, may constitute an international wrong entailing international responsibility. Determination of such responsibility involves application of international legal standards, and the sovereignty and domestic jurisdiction of a State whose conduct is in question are not a shield against such responsibility.

14. Because the protection of human rights is a matter of international concern, all States under international law have an individual and a collective interest in such protection. Institutionally, collective interests of States in monitoring the performance of human rights obligations are represented by appropriate intergovernmental human rights bodies operating at the international level. But in addition to the existence of human rights standards, the precise interests of States in relation to population transfer have to be more concretely defined in terms of criteria concerning the legality of transfer and the means, machinery and measures of protection against illegal transfer, including remedies.

15. However, the extrapolation of human rights-based legal criteria and their application to the situation of population movements on a massive scale have to be examined in the context of the normative structure of human rights in international law. This normative structure provides a framework within which the protection of human rights can be achieved generally. Of more

significance in this respect is the status of the applicable principles of international law and human rights in elaborating criteria concerning the legality of population transfer. The status of such principles is determined by the normative structure of human rights which provides a context in which the existence of the criteria relating to the legality of population transfer may be assessed appropriately.

16. "Normative structure" refers specifically to the structure of legal principles whose general application depends upon:

(a) The status of the principles of human rights concerning the movement, transfer and expulsion of persons or groups, and the strength and extent of their binding character. Human rights standards which are part of customary international law and which constitute norms of jus cogens may be applied to condition the legality of population transfer and have the advantage of being binding upon all States. Thus, standards prohibiting genocide, racial discrimination, slavery and torture and other cruel, inhuman or degrading treatment have a special relevance in prohibiting both the purpose and methods of population transfer which come within the scope of these standards;

(b) The validity of the permissible scope of restrictions on the exercise and enjoyment of certain rights which are pertinent to the movement, transfer and expulsion of populations. Both liberty or freedom of movement and residence within States, and the right to leave and to return carry important standards relating to the transfer of populations. However, both are subject to certain restrictions in the public interest and standards governing such restrictions are a source of legal criteria which may be used to determine the legality of the purpose and mode of displacement of a population or persons;

(c) The extent to which the application of specific human rights standards is limited by the principle of derogation during states of emergency. The forced movement or displacement of a population group can sometimes be effected during a state of emergency. Indeed, freedom of movement and choice of residence within States, and the right to leave and return are derogable rights. But certain standards apply during states of emergency, just as they do in times of armed conflict. On one hand, there are standards of an imperative character, such as those mentioned in (a) above, which are non-derogable and thus applicable to determine the legality of the transfer of a population as outlined above, even during a state of emergency. On the other hand, there are standards which provide safeguards against abuse of emergency powers and which relate to the manner of derogation and, therefore, to the manner of displacement or transfer.

17. The foregoing structure informs the analysis of the legality of population transfer in the following sections.

II. HUMAN RIGHTS STANDARDS CONCERNING THE TRANSFER OF POPULATIONS

18. A distinction can be made between standards which prohibit the transfer of populations and those which are permissive or regulatory in character. The former, though reflected in treaty, are part of customary international law,

while the latter are a product of general international law. As noted earlier, standards of customary international law are recognized as binding upon all States and they include the prohibition of genocide, torture and cruel, inhuman and degrading treatment, slavery, racial discrimination, or a pattern of discrimination. These standards also form peremptory or overriding norms of jus cogens whose character is such that they cannot be derogated or set aside, even by agreement or treaty. 1/

19. Since these principles constitute unlawful categories of conduct in international law, they can be employed to determine the legality of population transfer and the implantation of settlers and settlements by States in two ways. One is the prohibition of population transfer by reference to purpose or effect connected to these categories. Population transfer is clearly unlawful and prohibited where its purpose or effect constitutes or amounts to genocide, torture and its related elements, slavery, racial and systematic discrimination, and interference with the legitimate exercise of the right to self-determination, or where it is manifestly disproportionate to the exception of military necessity in humanitarian law.

20. For example, in the context of genocide, it would be unlawful to displace or transfer an ethnic group deliberately in order to inflict upon it conditions of life calculated to bring about its physical destruction, in whole, or in part, within the meaning of article II (c) of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948. By the same token, the proscription of racial discrimination prohibits population transfers aimed at specific groups such as minorities and indigenous peoples, especially where the purpose or effect is one of demographic manipulation by dispersing such groups from their home lands within the State.

21. Similarly, population transfer is unlawful if its purpose is punitive so as to subject a group to torture or cruel, inhuman and degrading treatment. Moreover, the standards contained in the Convention against Torture prohibit external expulsion or refoulement, whether of nationals, aliens, or refugees and asylum seekers, to countries where there is a risk of being subjected to torture or cruel, inhuman or degrading treatment.

22. The other way in which the legality of the transfer of population can be determined is by reference to the method of such transfer. Methods involving genocide, slavery, racial discrimination, torture or cruel, inhuman and degrading treatment, and denial of a valid exercise of self-determination are unlawful and prohibited by international law. However, with respect to the prohibition of both the purpose or effect, and the method of transfer, careful consideration has to be given to the application of the constituent elements of the standards concerned.

23. Genocide constitutes a crime and thus requires proof of intent; 2/ torture 3/ is also subject to proof and its constituent elements include action by State officials for specific purposes while the content of self-determination is less than clear, although its core is widely accepted. And in addition, the protection of minority, indigenous, or other disadvantaged ethnic groups, as well as women, may entail, within the meaning of the principle of non-discrimination, special forms of protection which preserve their identity and ways of life, and sexuality, based on equality of

treatment. Measures intended for the protection of women against sexual violence and systematic rape in settlements or camps may entail differential but justified treatment. 4/

24. Apart from customary law standards under which the transfer of populations is prohibited, there are permissive standards of international law regarding justification for the movement of populations, including transfer and settlement. The permissive standards are subject to the operative norms of jus cogens, as indicated above. The most obvious of these is the general principle that the displacement of populations or groups is lawful if it is done with their consent.

25. The principle of consent as a basis for relocation is evidenced by a resolution adopted by the Institute of International Law in 1952. 5/ Under this resolution, the applicable principle is that relocation may be legal only if it is voluntary. A resolution on its own standing is not binding but, as shown below, the principle reflected in this résolution has attained a binding status as a recognized general principle of law in international jurisprudence and by means of treaty standards. Because relocation is subject to consent, there is a general principle against forced relocation, movement, transfer, or implantation. As a corollary, forcible transfer of a population is an exception rather than the rule, and is thus subject to justification and should always be narrowly construed.

26. Existing treaty standards support this proposition and reflect general principles of law within the meaning of Article 38 (1) (c) of the Statute of the International Court of Justice. Thus, the principle of consent has been utilized to provide protection against the forced relocation of indigenous peoples in treaty regimes concluded by the International Labour Organisation. 6/ Construction of the standards contained in the Convention concerning Indigenous and Tribal Peoples, 1989 shows that: 7/

(a) There is a general prohibition against the removal or relocation of indigenous peoples from the lands which they occupy;

(b) Relocation is an exceptional measure which shall take place only with the free and informed consent of indigenous peoples;

(c) Forced relocation, i.e. without consent, shall take place subject to the safeguard of appropriate procedures established by national laws and regulations, including public inquiries where suitable in order to provide opportunity for effective representation of the people concerned.

(d) Because relocation is an exceptional measure, it is temporary in principle, and there is a right of return to land of previous occupation as soon as the grounds for relocation cease to exist;

(e) When such return is not possible, such impossibility must be determined by agreement with the people concerned. In the absence of such agreement, the principle of compensation 8/ shall apply.

27. Although these principles are included in Convention No. 169 in the context of the protection of indigenous peoples they are effectively principles of general application in international law. In the case involving the forced relocation of Miskito Indians in Nicaragua, 1982, the Inter-American Commission on Human Rights affirmed the preponderant doctrine that massive relocation of population groups may be juridically valid if done with the consent of the population involved. The Commission held that the principles of consent and compensation were of general application to cases of relocation, and accepted the temporary relocation of Miskitos on strict terms as an exceptional measure justified on grounds of military necessity owing to a state of emergency.

28. Two guiding principles concerning compensation can be deduced from this decision. One is that there must be preference, and not an imposition, on the part of a displaced population as to the mode of compensation. The other is that compensation applies irrespective of whether relocation is forced or based on consent, and regardless of whether it is temporary or permanent, it is a function or consequence of transfer or displacement, quite apart from the legality of such transfer.

29. Consent as a basis for relocation is more relevant to situations of settlement within States on account of development projects such as hydro-electric dams. It is inapplicable where movement is forced by environmental disasters, reasons related to public order, public security and armed conflict. The important thing is to develop sufficient monitoring mechanisms to ensure that consent is freely given by means of verified agreement between a Government and an affected population. Forcible transfer consists of an active element such as evacuation, deportation, or banishment, accompanied by the use force, including killing and assault or harassment, and cannot be justified. It can also be coerced, or even induced. In the case of a prolonged military occupation, an occupant may create economic and social conditions, the cumulative effect of which is to induce or coerce the population under occupation to leave. The "clever concealment" of those measures raises the important question about the meaning of the term "forcible population transfer". Distinguishing force in this general sense from other motives for transfer is difficult and it is proposed that it should be the subject of further enquiry in the final report.

30. A related dimension is that although a segment of a population may consent to relocate, the validity of such consent may be subject to the wishes of the inhabitants of the place of settlement. Where a minority claims an exclusive right to movement and residence in a given area, consent on the part of other persons to relocate to the area in question must be weighed against minority claims on the basis that freedom of movement and choice of residence within a State may be restricted to protect the rights of others. This argument is worthy of emphasis because the consent of an ambient population to relocate can be used to implant settlers in areas inhabited by minorities. While the principle of consent safeguards the forcible removal and dispersal of minority and indigenous groups settled in a distinct homeland, it cannot be used to achieve chauvinist overlaying of national areas by planting of settlements, and the imposition of cultural hegemony upon minorities.

31. Other manifestations in which the transfer of a population can take place is with respect to the modes of acquisition of territory in international law. 9/ Consent to population transfer in this regard can be expressed by means of treaty, or acceptance of the demarcation and delimitation of boundaries. For example, the Boundary Treaty between Senegal and the Gambia involved the transfer of territory and therefore of the population which occupied such territory by mutual consent. 10/ However, treaties relating to the acquisition of territory can be circumscribed by the prohibition on genocide. Thus, under the Law of Treaties, a treaty is invalid if it conflicts with norms of jus cogens.

32. Territorial changes brought about by the dissolution and constitution of new States can also lead to forcible population transfer. A prime example is the practice of ethnic cleansing in the territory of the former Yugoslavia. The principle of uti possidetis in combination with the recognition of Statehood should provide a basis for the settlement of territorial disputes and the protection of populations against forcible transfer in the event of the formation of new States.

33. In addition, as a result of changes in citizenship laws such as in the Baltic States following the dissolution of the former Soviet Union have produced the consequence that present generations of ethnic Russians who were implanted in the Baltic States are now subject to new, sometimes harsh, regulations concerning their status and rights as citizens.

34. In the wake of the peace agreements between Israel and the Palestine Liberation Organization, there is little doubt that the existence of Jewish settlements in the Occupied Territories has become one of the thorniest problems and can therefore be seen as an obstacle to the achievement of a just peace.

35. These events confirm the illegality of the original act of implanting settlers and show not only the impropriety of attempts to establish hegemony over a subject population group for political reasons, but also that the policy of implantation and assimilation of heterogenous population groups is problematic.

36. The protection afforded by human rights standards in international law against the arbitrary transfer of populations and the implantation of settlements and settlers can further be seen in the application of the standards concerning freedom of movement and residence within States. 11/ Freedom of movement and residence within States is established as an integrated right containing a general principle to which restrictions are the exceptions and not the rule. The classic formulation of the right of persons to move freely and choose their place of residence within States is evident from article 12 (1) and (3) of the International Covenant on Civil and Political Rights:

> "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his place of residence.

"3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant." (emphasis added)

37. Any form of forced population transfer from a chosen place of residence, whether by displacement, settlement, internal banishment, or evacuation, directly affects the enjoyment or exercise of the right to free movement and choice of residence within States and constitutes a restriction upon this right. 12/

38. From this point of view, ensuring respect for freedom of movement and choice of residence within the territory of a State generally provides protection against forced relocation, displacement and population transfer. Exercise of free movement and choice of residence is compatible with free consent to relocate. The latter is permissible as an exercise of personal liberty in the context of movement and residence. Therefore, freedom to move and select a place of residence encapsulates the principle of relocation of persons and groups based upon consent.

39. There are three distinct ways in which the standards relating to free movement and residence within States affect population transfer and implantation of settlers. First is the general prohibition on restricting movement and residence other than in ways and means specified by human rights standards. Second, legitimate restrictions may be imposed to determine the justification of population transfer on specified public interest grounds. Third, restrictions on movement and residence are applicable to protect claims of minority and indigenous groups to exclusive rights of movement and residence in the areas inhabited by them, to the exclusion of settlers or others.

40. In Sandra Lovelace v. Canada, 13/ the Human Rights Committee found that restrictions which protected the exclusive movement and residence of Maliseet Indians on the Tobique Reserve were justified under article 12 of the International Covenant on Civil and Political Rights. In the Australian case of Gerhardy v. Brown, 14/ legislation which gave an exclusive right to the movement and residence of an Aboriginal group was justified as a special measure under article 1 (4) of the Convention on the Elimination of All Forms of Racial Discrimination (1966).

41. The general prohibition on restricting free movement and choice of residence within States is emphasized by the characterization of restrictions on freedom of movement and residence within States as exceptional measures by which persons can be relocated without consent only for reasons justified on public interest grounds. If restrictions are exceptions, then the proposition that relocation, displacement and transfer of populations are subject to justification is reinforced. Consequently, restrictions have to be strictly construed and justified objectively by reference to the public interest grounds on which they are permissible.

42. Standards governing restrictions on the movement and residence of persons within States broadly maintain a balance between the protection of individual or group rights (i.e. protection of the rights of others, such as minorities and indigenous groups), and the protection of public interests. The protection available is to be found in the standards stipulating legal requirements for valid or permissible restrictions. These requirements place safeguards on the manner of displacement and the reasons therefor.

43. A primary safeguard is that restriction of movement and residence must be effected by law. This means that restrictions enforcing relocation must be neither arbitrary nor arbitrarily imposed. This standard is of general application and the mode of its application to cases of forced relocation is apparent under the principle that forced relocation of indigenous groups is required to be compatible with safeguards and procedures established by domestic law. 15/ The latter does not bear a self-contained or exclusive standard.

44. Indeed, international standards serve the purpose of determining the quality of acceptable domestic law. Accordingly, reference to domestic "law" denotes law of a certain quality, namely, of a statutory nature. An underlying premise is that of a law debated upon by a democratic legislative process which prescribes broadly agreed parameters for restricting movement or residence within States. It is questionable on this basis whether decrees constitute permissible restrictions according to which persons can be relocated legally. 16/

45. The requirement for restrictions on freedom of internal movement and residence to be made by law is a preliminary form of protection. In substance, the validity of such restrictions also depends on whether they relate to public interest grounds specified by international human rights standards. Thus restrictions enforcing the relocation of persons are permissible if they are necessary to protect specific grounds of public interest. They can be invoked justifiably as a matter of necessity related proportionately to public interest grounds. But the necessity for relocation, and the measures by which it is achieved have to be reasonably related and proportionate to the protection of a particular public interest. For instance, freedom of movement and residence may be restricted to provide the protection of exclusive movement to minorities and indigenous groups. 17/

46. An umbrella safety net is that restrictions must be compatible with the enjoyment of other civil and political rights. 18/ Restrictions on movement and residence should not be used as a denial of the enjoyment of other rights. In simple terms, human rights protects the notion of sustainability on the part of persons whose movement and residence is restricted by forcible relocation.

47. A few observations may be made in summary. The essence of public interest grounds in human rights is to provide a regulated basis for limiting the scope of enjoyment of particular rights, either in the public interest, or in the interest of protecting persons whose freedom has been restricted. A State which imposes such restrictions has a margin of appreciation as to the

circumstances of application but its action in this respect is open to international scrutiny as a matter of human rights protection. 19/

48. Other restrictions on freedom of movement and residence within States on public grounds are meant to operate in ordinary circumstances not involving situations of emergency. They are applicable to persons displaced by environmental causes, communal violence of low intensity, and public disorder or disturbances. The protection accorded in this respect is in the form of restricting movement and residence either to areas of danger to lives and safety, or from such areas by forced relocation to areas of safety.

49. The right to leave and return bears important standards regarding international movement, external expulsions, and the protection of refugees. In terms of content, the right to leave and to return is subject to the same restrictions on the same grounds as the right of movement and residence within States. Although the reasons for the restrictions may be different, the standards on which the restrictions are justified are the same as in the case of the movement and residence of persons within States.

50. The right to leave and to return is clearly voluntary. The standards underlying the formulation of article 12 (2) of the International Covenant on Civil and Political Rights presuppose a right of entry and stay in another State, as well as return to the State of origin. Issues which touch upon the right to leave and return include the mass expulsion of nationals or aliens, the admission of refugees and asylum-seekers, and the readmission of returning refugees. In general, human rights standards can be taken as establishing a presumption against mass expulsions, whether of nationals or aliens, especially long-term residents. The standards in article 13 of the International Covenant on Civil and Political Rights permit expulsion of individual aliens pursuant to a decision reached by law and in accordance with due process, except where, in the case of the latter, compelling reasons of national security require otherwise.

51. Amongst the grounds upon which the expulsion of aliens on an individual basis is justified in State practice are: entry in breach of law; breach of conditions of admission; involvement in criminal activities; political and security considerations. 20/ However, there are procedural and substantive limitations upon the power of States to expel aliens and the presence of such limitations means that the mass expulsion of persons often overwhelms or disregards such procedures. As a consequence, mass expulsions may be prima facie unlawful. For example, article 12 (5) of the African Charter on Human and Peoples' Rights prohibits the mass expulsion of non-nationals and defines mass expulsions as those which are aimed at national, racial, ethnic or religious groups.

52. The right to leave and return is related to the right of persons to seek and enjoy in other countries asylum from persecution, 21/ although the latter differs in at least two ways. Firstly, the latter is involuntary and is exercisable on the basis of a well-founded fear of persecution as well as by those fleeing external aggression, occupation, foreign domination, or other events seriously disturbing public order, and gross violations of human rights. 22/ Secondly, the former is subject to the discretion of States,

while in the case of the latter, the discretion of States is fettered by international obligations towards refugees. One of the most important of these is inherent in the principle of non-refoulement which prohibits the expulsion of asylum seekers and refugees to countries where there is a risk to their freedom and lives as stipulated under article 33 of the Convention relating to the Status of Refugees, 1951. The principle of non-refoulement arguably is a norm of customary international law, as evidenced by its inclusion in article 3 of the Convention Against Torture, 1984. This provision expands upon the principle of non-refoulement by extending its scope to States where persons, including refugees, face a risk of being subjected to torture, and in which a consistent pattern of gross, flagrant or mass violations of human rights exists.

53. As formulated, the right to seek and enjoy asylum in other countries clearly incorporates the requirement to gain access to territories of such countries and their status-determination procedures. However, there are attendant problems which undermine the right to seek asylum. 23/ The following may be noted: the requirement for entry and exit visas, restrictions upon entry by carrier sanctions, third country of asylum practice, restrictive interpretations of the refugee definition, summary procedures, and resort to the fiction of so-called "international zones" at ports of entry, including interdiction in order to avoid international obligations.

54. A very significant aspect of population transfers takes place through the right to return. International practice shows that the right to return forms the basis for claims of a displaced population to the return to places of origin on a voluntary footing. As early as 1948, the General Assembly resolved, in resolution 194 (111), that Palestinian refugees wishing to return to their homes and live at peace with their neighbours should do so at the earliest practical date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under the principles of international law or in equity, should be made good by the Governments or authorities responsible.

55. In practice, the return of a displaced population is a complex exercise which involves the role of international agencies. For the right to return requires the facilitation of repatriation, resettlement and economic and social rehabilitation of returnees by means of international arrangements or agreements. For those not wishing to return, the right to leave and return encapsulates the right to remain, which is evidently receiving some recognition. In recommendation 1154 (1991) on North African migrants in Europe, the Council of Europe recommended as follows: 24/

> "The fact that more than two million North African migrants are settled in Europe is no longer a temporary situation but a permanent one. The Council of Europe must provoke wide-ranging dialogue between the political leaders in the host countries, the countries of origin and representatives of North African migrants, so as to define the broad outlines of an integration policy."

56. Further discussion of the right to leave, remain and return, follows under the section on armed conflict below. For now, attention is drawn to the problem of forcible population transfers and derogation of rights.

III. POPULATION TRANSFERS AND DEROGATION

57. Population movements in certain cases are enforced under public emergency powers during armed conflict, communal or ethnic violence, natural and man-made disasters. These events lead to flight, expulsions and forced evacuations which are rendered legal by the abrogation or suspension of derogable rights, including internal freedom of movement and residence, and the right to leave and to return.

58. Derogation of rights underpins the issue of the standards governing population transfer during states of emergency. An outline of the relevant standards may be made as follows. First of all, there is protection on the basis of non-derogable rights forming part of jus cogens in customary international law and which have been considered already. 25/

59. Secondly, there are standards concerning derogation on the basis of which the legality of population transfer as a function of derogation can be determined. Derogation is subject to international standards relating to: the grounds on which it is justified; the mode of derogation; the application of derogative measures without discrimination; and the obligation to discharge international obligations in times of public emergency. 26/

60. However, derogation is a temporary protective measure in the face of overwhelming circumstances and application of these standards is relative to the purpose of derogation, such as the evacuation of persons to safety, and the mobilization of resources and the means necessary to deal with earthquakes, floods, landslides and volcanic eruptions.

61. With regard to situations of internal conflict, the Inter-American Commission, for example, justified the relocation of the Miskitos on the basis of the situation of emergency and the military measures that were essential to overcome attacks by armed bands in Nicaragua. Given that the Miskitos inhabited an area in which military operations were necessary, their relocation was also a protective measure. Relevant principles of protection related to forced relocation in the circumstances of derogation as applied by the Commission may be deduced as follows:

(a) Official proclamation of a state of emergency has to be communicated effectively to avoid terror and confusion when it involves relocation; 27/

(b) Relocation should be proportionate to the danger, degree and duration of a state of emergency;

(c) Relocation must last only for the duration of an emergency. Consequently, there is a right of return of a displaced population to their original land, if they so desire, following the termination of an emergency situation:

"In the opinion of the Commission ... the Miskitos who choose not to remain in the Tasba Pri once the emergency is over may return to the Coco River region, which means that the measures should be limited only to the duration of the emergency, thus meeting the other requisites established by the pertinent norms ..." 28/;

(d) Relocation and return must not be carried out in a discriminatory manner, particularly where the relocation of ethnic, minority and indigenous groups is concerned.

62. The basic problem is that states of emergency are invoked frequently and last longer than necessary, although this is a general problem of the effective implementation of human rights standards and is to be distinguished from the absence of standards of protection altogether.

IV. POPULATION TRANSFER AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS

63. Non-fulfilment of economic, social and cultural rights plays an important role in population transfers. The non-availability of the basic necessities of life, including adequate living standards, employment, decent shelter, education and health, is a "pull factor" which induces persons to leave countries of origin in search of better living standards and better opportunities, much to the detriment of developing countries. Poor economic conditions are, moreover, a source of social and political instability which leads to tension and conflicts generating mass population movements. Structural adjustment programmes tend to exacerbate poverty among large pockets of the population and create suffering rather than alleviate it, 29/ and must be subject to human rights standards. The standards contained in the International Covenant on Economic, Social and Cultural Rights are related to the obligations concerning equality of well-being of peoples under Articles 55 and 56 of the Charter of the United Nations. They also carry concrete obligations some of which are of immediate effect 30/ and establish standards according to which the performance of States can be measured. These obligations are binding upon States and programmes and policies undertaken by States in the name of development and must be consistent with the fulfilment of the economic and social rights of everyone.

64. Population transfer in the context of development projects 31/ must be based strictly on the consent of a population to relocate. As shown in the section on State responsibility, such relocation may entail responsibility on the part of the State and agencies involved, and consent may be obtained on the basis of the economic benefits of a given project conferred upon the displaced population itself and must be monitored through human rights standards.

V. POPULATION TRANSFER AND THE LAW OF ARMED CONFLICT

65. The Law of Armed Conflict in its totality is a complex branch of international law containing standards of conduct in situations of armed conflict. 32/ The purpose of this section is to explore the legal

standards governing the internal and external transfer of populations during armed conflict. Applicable standards obviously derive in the main from the protection of the civilian population under the Law of Armed Conflict. 33/

66. The general standards applicable to conflicts of an internal character prohibit the forced relocation of civilians. 34/ Of basic importance are the provisions of article 17 of the Additional Protocol II to the Geneva Conventions of 12 August 1949 which read as follows:

> "1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.
>
> 2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict."

Displacement as used in this provision covers population transfer. Article 17 shows the importance attached to the protection of populations against transfer during armed conflict. Leaving aside the exceptions, the general prohibition against population transfer applies at all times, during peace and during conflict. Even derogation of human rights is limited as a basis for effecting population transfer in times of conflict. Failure of the Inter-American Commission in the Miskitos case to consider derogation of freedom of movement and residence of the Miskito Indians in the context of the standards of armed conflict may be criticized.

67. An exception to the prohibition against population transfer is provided in article 17 where the security of the civilians is involved or imperative military reasons so demand. However, the legal consequences of this exception are that: such displacement is not prima facie lawful and a party to a conflict which displaces civilians for these reasons bears a burden of proof; and a party which evacuates or displaces a population for the stated reasons has the responsibility of taking all possible measures aimed at ensuring that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

68. The prohibition against compelling civilians to leave their territory for reasons unconnected with their protection or military necessity confirms the proposition that the expulsion and transfer of nationals abroad during internal conflict is unlawful. When such expulsions occur, as in the case of internal conflicts in Rwanda, Somalia and the former Yugoslavia, their claim for protection as refugees in other States is justified. In this sense, the right to remain is a corollary of the prohibition of the expulsion of persons and populations in internal conflicts.

69. Standards pertaining to internal armed conflicts also provide protection against indirect displacement of populations owing to the means, methods and effects of the conflict. The general principle is enunciated in article 13 of Additional Protocol II under which the civilian population shall enjoy general

protection against the dangers arising from military operations. In particular, the civilian population as such shall not be the object of attack, and acts of violence whose primary purpose is to spread terror among the civilian population are prohibited.

70. Further protection is available in article 14 of the same Protocol in relation to objects indispensable to the survival of the civilian population. Protection in this sense takes the form of prohibition of starvation of civilians as a method of combat. The content of the prohibition includes attack, destruction, removal or rendering useless objects such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works. A similar prohibition extends to works and installations containing dangerous forces such as dams and nuclear electrical generating stations (art. 15).

71. So far as armed conflicts of an international character are concerned, it is useful to note that the issue of population transfer is addressed in the context of occupation, and in the context of the right of aliens to leave the territory of a Party to the conflict. Article 49 of the Fourth Geneva Convention deals directly with population transfer, deportation, and evacuation in occupied territories, while article 35 of the same Convention and other related provisions are concerned with the repatriation and right of aliens to leave the territory of a party to the conflict.

72. The civilian population in the territory of a party to a conflict falls within the ambit of protection accorded under the Law of Armed Conflict. There is a categorical prohibition contained in article 49 against individual or mass forcible transfers of populations. This prohibition is declaratory of customary international law 35/ and its content covers forcible or mass transfers, deportation or evacuation, of persons from an occupied territory to the territory of either the Occupying Power, or any other country whether it is occupied or not.

73. Conversely, the Occupying Power is prohibited from deporting or transferring parts of its own civilian population into the territory it occupies. As a consequence, the implantation of settlers and settlements in occupied territory by an Occupying Power is prohibited by international law. The scope of the prohibition is wide enough and is without regard to the motive for which such transfer, evacuation, or deportation takes place.

74. An exception to the prohibition enumerated above is a narrow one, and limits to invoking it are carefully circumscribed. Total or partial evacuation of a given area of occupied territory may be undertaken only if the security of the population or imperative military reasons so demand. The circumscription to the exception is that such evacuation may not involve the displacement of the population concerned outside the occupied territory except when it is impossible to avoid such transfer or displacement for material reasons. The latter may be construed as referring to welfare and material needs. If so, the external transfer of a population evacuated from a given portion of occupied territory may be avoided by the provision of its material needs by means of international assistance.

75. Moreover, there is a right of return which requires that persons who have been externally evacuated on security and imperative military grounds shall be transferred back to their homes as soon as the hostilities have ceased in the area in question. In addition, there are obligations which are incumbent upon an Occupying Power which resorts to population transfer as an exceptional measure.

76. Thus, removals or transfers must be effected in satisfactory conditions of hygiene, health, safety and nutrition and respect of the principle of family union. Proper accommodation for an evacuated population must be provided. There is a duty, presumably of an Occupying Power, to inform the Protecting Power of any transfers and evacuations as soon as they have taken place. A special quality pertains to the first two of these obligations and it is that they must be ensured to the greatest practical extent.

77. A number of reasons may be advanced in support of the prohibition against population transfer and the implantation of settlers and settlement in the occupied territories. To begin with, it is obvious that the prohibition is intended to prevent alteration of the composition of a population in an occupied territory in order for it to retain its ethnic identity. Another is that population transfers cannot be used as a means of asserting title or sovereignty over an occupied territory. Even a State which is lawfully engaged in the use of force, such as self-defence, cannot validly acquire territory which it occupies during hostilities. 36/ To permit acquisition of title to territory by occupation would be to sanction dominion over such territory and sanction evasion of obligations set by the Law of Occupation.

78. Writing in 1963, Jennings 37/ authoritatively dismissed the notion of the acquisition of title by occupation as follows:

> "... the suggestion that the State which does not resort to force unlawfully, e.g. resorts to war in self-defence, may still acquire a title by conquest ... though not infrequently heard, is to be regarded with some suspicion. It seems to be based upon a curious assumption that, provided a war is lawful in origin, it goes on being lawful to whatever lengths it may afterwards be pursued. The grave dangers of abuse inherent in any such notion are obvious ... Force used in self-defence must be proportionate to the threat of immediate danger, and when the threat has been averted the plea of self-defence can no longer be available ... it would be a curious law of self-defence that permitted the defender in the course of his defence to seize and keep the resources of the attacker."

79. Indeed, it is safe to assert that international law views military occupation as an abnormal and temporary phenomenon. The protection it affords a civilian population under occupation can best be appraised within the correlatives of power and protection rather than of right and duty. It is important to keep in mind that the ability of the civilian population as the weaker party to assert its rights within a rigid framework of rights and duties is illusory because its ability to ascertain its rights is ex hypothesi unavailable by the very fact of occupation.

80. The inadequacy of the protection afforded by humanitarian law to a civilian population under military occupation is particularly apparent in situations of prolonged military occupation and where, moreover, the belligerent occupant harbours designs of settlement and colonization upon the occupied territory.

81. In such situations, the authorities of the military occupant and their supporters may resort to exotic legal reasoning to justify forcible population transfer and/or the implantation of settlements. For instance, with regard to the Israeli occupation, Israel has argued for the inapplicability of the Fourth Geneva Convention on grounds that the territory in question was terra nullius, the ousted sovereign not having had title in the first place and the belligerent occupant possessing superior title having acquired it through self-defence. 38/ The inherent danger of abuse in predicating title to territory on unilaterally asserted pleas of self-defence have been vividly illustrated by Judge Jenning's above-quoted passage. 39/

82. The important point to underscore is that many cases of occupation result from disputes relating to territorial claims; the whole concept of humanitarian protection would collapse if a State could successfully assert that humanitarian law is inapplicable because it claims better title to the territory under occupation than the ousted sovereign. The position taken by the international community emphatically denies any such title upon an Occupying Power. 40/ And it is extremely doubtful whether the discredited concept of res nullius has any application in the late twentieth century. This shift is evident in a recent decision of the Australian Supreme Court in the case of Mabo (No. 2) 41/ where it stated that territory which was occupied by native Aborigines in Australia was not terra nullius.

83. Another argument to justify the implantation of settlers and settlements is that such implantation within the meaning of article 49 of the Fourth Geneva Convention is prohibited only to the extent that it bears directly to the expulsion or transfer of the inhabitants of the occupied territory. 42/ This claim finds no support in the plain meaning of the words of article 49 or in the intention of the drafters of the Fourth Geneva Convention and has been similarly rejected by the international community. Thus, for example, in Security Council resolution 484 of 19 December 1980, the Council reaffirmed the applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949 to all the Arab territories occupied by Israel in 1967, and called upon Israel as the Occupying Power to adhere to the provisions of the Convention.

84. An authoritative legal opinion on this issue was given in the Letter of the State Department Legal Advisor, Mr. Herbert J. Hansell, Concerning the Legality of Israeli Settlements in the Occupied Territories of 21 April, 1978. 43/ In that Letter, the Legal Advisor to the State Department of the United States stated as follows:

> "Dear Chairmen Fraser and Hamilton:
>
> Secretary Vance has asked me to reply to your request for a statement of legal considerations underlying the United States view that the establishment of the Israeli civilian settlements in the

territories occupied by Israel is inconsistent with international law. Accordingly, I am approving the following in response to that request:

The Territories Involved

The Sinai Peninsula, Gaza, the West Bank and the Golan Heights were ruled by the Ottoman Empire before World War I. Following World War I, Sinai was part of Egypt; the Gaza strip and the West Bank (as well as the area east of the Jordan) were part of the British Mandate for Palestine; and the Golan Heights were part of the French Mandate for Syria. Syria and Jordan later became independent. The West Bank and Gaza continued under British Mandate until May 1948.

In 1947, the United Nations recommended a plan of partition, never effectuated, that allocated some territory to a Jewish state and other territory (including the West Bank and Gaza) to an Arab state. On 14 May 1948, immediately prior to British termination of the Mandate, a provisional government of Israel proclaimed the establishment of a Jewish state in the areas allocated to it under the Jewish plan. The Arab League rejected partition and commenced hostilities. When the hostilities ceased, Egypt occupied Gaza, and Jordan occupied the West Bank. These territorial lines of demarcation were incorporated, with minor changes, in the armistice agreements concluded in 1949. The armistice agreements expressly denied political significance to the new lines, but they were de facto boundaries until June 1967.

During the June 1967 war, Israeli forces occupied Gaza, the Sinai Peninsula, the West Bank and the Golan Heights. Egypt regained some territory in Sinai during the October 1973 war and in subsequent disengagement agreements, but Israeli control of the other occupied territories was not affected, except for minor changes on the Golan Heights through a disengagement agreement with Syria.

The Settlements

Some seventy-five Israeli settlements have been established in the above territories (excluding military camps on the West Bank into which small groups of civilians have recently moved). Israel established its first settlements in the occupied territories in 1967 as para-military 'nahals'. A number of 'nahals' have become civilian settlements as they have become economically viable.

Israel began establishing civilian settlements in 1968. Civilian settlements are supported by the government, and also by non-governmental settlement movements affiliated in most cases with political parties. Most are reportedly built on public lands outside the boundaries of any municipality, but some are built on private or municipal lands expropriated for the purpose.

Legal Considerations

1. As noted above, the Israeli armed forces entered Gaza, the West Bank, Sinai and the Golan Heights in June 1967, in the course of an armed conflict. Those areas had not previously been part of Israel's sovereign territory nor otherwise under its administration. By reason of such entry of its armed forces, Israel established control and began to exercise authority over these territories; and under international law, Israel became a belligerent occupant of these territories.

Territory coming under the control of a belligerent occupant does not thereby become its sovereign territory. International law confers upon the occupying State authority to undertake interim military administration over the territory and its inhabitants; that authority is not unlimited. The governing rules are designed to permit pursuit of its military needs by the occupying power, to protect the security of the occupying forces, to provide for orderly government, to protect the rights and interests of the inhabitants, and to reserve questions of territorial change and sovereignty to a later stage when the war is ended. See L. Oppenheim, 2 International Law 432-438 (7th ed., H. Lauterpacht ed., 1952); E. Feilchenfield, The International Economic Law of Belligerent Occupation 4-5, 11-12, 15-17, 87 (1942); M. McDougal & F. Feliciano, Law and Minimum World Public Order 734-46, 751-7 (1961); Regulations annexed to the 1907 Hague Convention on the Laws and Customs of War on Land, Articles 42-56, 1 Bevans 643; Department of the Army, The Law of Land Warfare, Chapter 6 (1956) (FM-27-10).

'In positive terms, and broadly stated, the Occupant's powers are (1) to continue orderly government, (2) to exercise control over and utilize the resources of the country so far as necessary for that purpose and to meet his own military needs. He may thus, under the latter head, apply its resources to his own military objects, claim services from the inhabitants, use, requisition, seize or destroy their property, within the limits of what is required for the army of occupation and the needs of the local population.

But beyond the limits of quality, quantum and duration thus implied, the Occupant's acts will not have legal effect, although they may in fact be unchallengeable until the territory is liberated. He is not entitled to treat the country as his own territory or its inhabitants as his own subjects..., and over a wide range of public property, he can confer rights only as against himself, and within his own limited period of de facto rule. J. Stone, Legal Controls of International Conflict, 697 (1959).'

On the basis of the available information, the civilian settlements in the territories occupied by Israel do not appear to be consistent with these limits on Israel's authority as belligerent occupant in that they do not seem intended to be of limited

duration or established to provide orderly government of the territories and, though some may serve incidental security purposes, they do not appear to be required to meet military needs during the occupation.

2. Article 49 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 UST 3516, provides, in paragraph 6:

'The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies'.

Paragraph 6 appears to apply by its terms to any transfer by an occupying power of parts of its civilian population, whatever the objective and whether involuntary or voluntary. 44/ It seems clearly to reach such involvements of the occupying power as determining the location of the settlements, making land available and financing of settlements, as well as other kinds of assistance and participation in their creation. And the paragraph appears applicable whether or not harm is done by a particular transfer. The language and history of the provision lead to the conclusion that transfers of a belligerent occupant's civilian population into occupied territory are broadly proscribed as beyond the scope of interim military administration.

The view has been advanced that a transfer is prohibited under paragraph 6 only to the extent that it involves the displacement of the local population. Although one respected authority, Lauterpacht, evidently took this view, it is otherwise unsupported in the literature, in the rules of international law or in the language and negotiating history of the Convention, and it seems clearly not correct. Displacement of protected persons is dealt with separately in the Convention and paragraph 6 would seem redundant if limited to cases of displacement. Another view of paragraph 6 is that it is directed against mass population transfers such as occurred in World War II for political, racial or colonization ends; but there is no apparent support or reason for limiting its application to such cases.

The Israeli civilian settlements thus appear to constitute a 'transfer of parts of its own civilian population into the territory it occupies' within the scope of paragraph 6.

3. Under Art. 6 of the Fourth Geneva Convention, paragraph 6 of Article 49 would cease to be applicable to Israel in the territories occupied by it if and when it discontinues the exercise of governmental functions in those territories. The laws of belligerent occupation generally would continue to apply with respect to particular occupied territory until Israel leaves it or the war ends between Israel and its neighbours concerned with the particular territory. The war can end in many ways, including by express agreement or by de facto acceptance of the status quo by the belligerent.

4. It has been suggested that the principles of belligerent occupation, including Article 49, paragraph 6, of the Fourth Geneva Convention, may not apply in the West Bank and Gaza because Jordan and Egypt were not the respective legitimate sovereigns of these territories. However, those principles appear applicable whether or not Jordan and Egypt possessed legitimate sovereign rights in respect of those territories. Protecting the reversionary interest of an ousted sovereign is not their sole or essential purpose; the paramount purposes are protecting the civilian population of an occupied territory and reserving permanent territorial changes, if any, until settlement of the conflict. The Fourth Geneva Convention, to which Israel, Egypt and Jordan are parties, binds signatories with respect to their territories and the territories of other contracting parties, and "in all circumstances" (Article 1), and in 'all cases' of armed conflict among them (Article 2) and with respect to all persons who 'in any manner whatsoever' find themselves under the control of a party of which they are not nationals (Article 4).

Conclusion

While Israel may undertake, in the occupied territories, actions necessary to meet its military needs and to provide for orderly government during the occupation, for reasons indicated above the establishment of the civilian settlements in those territories is inconsistent with international law."

85. A further perspective to the dimension of population transfer is the inclusion of the right of aliens to leave the territory of a party to the conflict. Although this right exists by way of entitlement under article 35 of the Fourth Geneva Convention, its exercise is a voluntary matter, either at the outset of or during conflict. But where the departure of aliens is contrary to the national interests of the State involved, their right to leave may be refused. Refusal is subject to justification and there is right of appeal. However, the right of aliens to leave in the context of armed conflict is exercised by means of application in accordance with regular procedure with an injunction to process decisions as quickly as possible.

86. A significance of the existence of the right to leave during armed conflict, and the fact that this right is exercised pursuant to certain procedures, may well mean that there is a safeguard against massive and arbitrary expulsions of enemy aliens by enemy States during armed conflict. It is doubtful whether the right in question is available to refugees in the territory of a party to a conflict, given that they have distinct protection not to be treated as enemy aliens on the basis of their nationality, and also because they lack the protection of the State of origin. Under international humanitarian law, refugees have protection additional to that given civilians, and in addition benefit from the 1951 Convention's provision against expulsion.

VI. STATE RESPONSIBILITY AND POPULATION TRANSFER

87. Reference was made in the preliminary report to the work of the International Law Commission on State responsibility. 45/ It is now proposed to discuss that work in greater detail in order to ascertain, albeit in a preliminary manner, its implications for the phenomenon of population transfer and the implantation and settlement of settlers.

88. Such a discussion, the Special Rapporteur believes, has a bearing on the question of remedies and is useful in view of the fact that in spite of many general writings on the position of the individual in international law, to date the issue of the entitlement of individuals to such remedies in international law has not been sufficiently clarified.

89. The core of the theory of State responsibility is that responsibility arises - in the inter-State system - when there is a breach of an international obligation of the State through conduct consisting of an action or omission attributable to the State under international law. Responsibility, of course, is not an end in itself. The wages of sin is death, not responsibility. Its significance is that it leads to consequences for the wrongdoing State which vary according to the importance of the obligation breached, i.e. it could lead to the consequences normally associated with delictual responsibility for most breaches (delicts) or to those associated with criminal responsibility for particularly serious breaches (crimes).

90. The first duty that international law demands from a wrongdoing State is cessation 46/ of the wrongful act if it is of a continuing character. However, compliance with such a duty does not in itself relieve the wrongdoing State of its responsibility. Hence, in addition, reparation may also be demanded. Reparation is a generic term consisting in the various methods available to a State for discharging, or releasing itself from, responsibility. The Permanent Court of International Justice formulated the basic rule on this subject, as follows:

> "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form". 47/
>
> "The essential principle contained in the notion of an illegal act - a principle which seems to be established by international practice and, in particular, by the decisions of arbitral tribunals - is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed." 48/

91. The forms through which full reparation may be obtained are: restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition. The injured State is entitled to obtain reparation through those forms either singly or in combination. The wrongdoing State may not invoke the provisions of its internal law as justification for the failure to provide full reparation. 49/

92. The first of these forms is restitution in kind. In the aforementioned passage from the judgement of the Permanent Court of International Justice, the concept was widely defined to cover not only the restoration of the status quo ante, but a return to a theoretical situation that would have existed (but did not) had it not been for the intervention of the wrongful act. Such a definition would encompass integrative compensation. The Commission, however, chose a more restrictive approach. Its definition of restitution in kind is confined to restoring the status quo ante without prejudice to possible compensation for lost profits. 50/ While such a solution is not as close to the requirement that the consequences of a wrongful act should be "wiped out", it is supported by many decisions 51/ and can be more easily verified than an assessment of a situation that never existed.

93. The primacy of restitution in kind over compensation is generally acknowledged. As a matter of logic and morality, it would be untenable for any system of law - including international law - to allow its breaches to be settled by compensation (reparation by equivalent). By definition restoring the original situation before the breach took place is the primary concern of the law. Admittedly, restitution in kind is almost always more difficult to obtain than compensation, which may account for the fact that, statistically, a preponderance of reparation by equivalent is easily discernable in judicial and arbitral practice. 52/ What is important to keep in mind is that even in such cases, the parties concerned usually insist on restitution in kind and "settle" for compensation in view of the improbability of obtaining restitution in kind. The Commission chose a flexible approach: while the commentaries to draft article 7 leave no doubt as to the primacy of restitution in kind rightly indicated as "naturalis restitutio", the opening words of article 7 were couched in terms of an entitlement of the injured State and makes the discharge of the duty of restitution in kind conditional upon a corresponding claim on the part of the injured State. 53/

94. While not oblivious to the reasons that led the Commission to adopt a flexible approach on this question, which pertain to the prospects of acceptability of the draft by States, the present Special Rapporteur thinks it unfortunate that too wide a discretion should be left to the injured State to decide on whether to substitute restitution in kind by reparation by equivalent (compensation). In the field of forcible population transfer and the implantation of settlers - indeed, in the whole area where breaches of human rights are concerned - the discretion of the injured State will, in practice, mean that the provision will work in favour of the rich and strong to the detriment of the weak and poor.

95. The victims of forcible population transfer may find that the State espousing their claims is forced or tempted to substitute their right to repatriation (restitution in kind) by compensation (pecuniary or in kind). Yet, how can compensation make up for the fact that exile is "a fundamental deprivation of homeland, a deprivation that goes to the heart of those immutable characteristics that comprise our personal and collective entities." 54/ Indeed, coupled with the restrictive definition of reparation (article 6), such victims may find - once compensation is settled for - that the lost profits of their properties, projects, etc. might well be outside the scope of compensatable loss. 55/

96. The operation of restitution in kind is limited by four exceptions: first, material impossibility. Thus, if members of the population that had been forcibly transferred perish, their repatriation would become materially impossible. Conversely, if their homes were burnt, it would be impossible to implement restitution in kind. In the first hypothesis, their relatives should be able to claim restitution in kind, i.e. repatriation. What is not clear is for how long such a right can survive the passage of time. Material impossibility could also ensue from a fundamental change in the demographic balance in the State from which population transfer was affected. Thus, while the Crimean Tartars returning to their ancestral homes find that many of their homes and lands have been taken over by other immigrants, that would not constitute prima facie material impossibility. But the situation may be different if many decades had passed since the expulsion of a population from its homeland. It is suggested that, in this area, material impossibility should be narrowly construed so as to exclude the results of actions brought about by the State that caused the population transfer, i.e. by bringing in new inhabitants. At the same time, it is wise to exercise caution in passing sweeping judgements, because the exercise of the right to restitution in kind may involve, with the passage of time, the displacement of other people who might be innocent of the original population transfer.

97. Second, restitution in kind should not involve a breach of an obligation arising from a peremptory norm of general international law. Thus, a war of aggression may not be waged to obtain, for example, the repatriation of refugees to the State from which they fled. It is less clear whether a population transfer amounting to genocide or involving mass violations of human rights, and hence fit to be qualified as an international crime, could be opposed by forcible countermeasures and whether such a reaction would be legitimate only when there has been a prior determination by the Security Council. 56/

98. Third, restitution in kind should not involve a burden out of all proportion to the benefit which the injured State could gain from obtaining restitution in kind, instead of compensation. This so-called "excessive onerousness exception" is based on considerations of equity. As such, in the case of the most serious breaches, for example population transfer amounting to genocide, it would be inequitable to consider the effort of reparation excessive and to settle for compensation. As was indicated above (para. 89), those breaches may, in view of their gravity, entail the legal consequences of crimes. At this stage of the development of the ILC project, it is still not clear what fate will ultimately befall its concept of the international criminal responsibility of States (described in article 19, Part I). This uncertainty notwithstanding, it is likely and logical that the limitation of excessive onerousness will be eliminated or curtailed with regard to restitution of breaches of a very serious nature (crimes).

99. The fourth exception - as the commentary makes clear - "refers to very exceptional situations and may be of more restrospective than current relevance. Its content is that if the injured State would not be similarly affected, restitution in kind should not be sought when there is serious jeopardy of the political independence or economic stability of the State which has committed the internationally wrongful act." 57/

100. The field of application of this limitation relates primarily to the area of foreign investment and as such does not concern us.

101. Compensation is in practice the most commonly obtained remedy. As indicated above (para. 91), it might be sought singly or in combination with other remedies, primarily restitution in kind to obtain full reparation, i.e. the wiping out of the consequences of the wrongful act. In contrast to the relative scarcity of judicial and arbitral awards relating to mass population transfer, the political organs of the United Nations have had, on more than one occasion, a chance to address this question and to demand restitution in kind and/or compensation. Thus, acting upon the suggestion of the United Nations Mediator on Palestine, Count Bernadotte, the General Assembly adopted resolution 194 (III) of 11 December 1948, resolving in paragraph 11 that

> "the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which under the principles of international law or in equity should be made good by the governments or authorities responsible." 58/

In 1950, the General Assembly adopted resolution 393 (V) on "Assistance to Palestine refugees, in which the Assembly considered that the reintegration of the refugees into the economic life of the Near East, either by repatriation or resettlement" - presumably in pre-existing Arab States as well as within Israel - was essential for the peace and stability of the area. Since 1948, the General Assembly has adopted many resolutions which typically note with deep regret that repatriation or compensation has not been effected. Resolution 242 (1967), adopted by the Security Council, is couched in more general terms - it only affirms "the necessity of achieving a just settlement of the refugee problem". In the current Middle East peace process, based on resolution 242, finding a just solution to the refugee problem is addressed both in the bilateral and multilateral talks. The two questions of compensation (integration of the refugees) and repatriation remain unresolved.

102. Language similar to General Assembly resolution 194 (III) can be found in the relevant resolutions on Afghanistan and Cambodia. Recently, addressing the situation of human rights in the territory of the former Yugoslavia, the General Assembly reaffirmed the right of all persons to return to their homes in safety and dignity. Likewise, the Commission on Human Rights stressed a few months ago the right of any victim [of ethnic cleansing] to return to their homes. In contrast to the resolution on Palestine, these resolutions are mostly silent on the question of compensation 59/ except to the extent that such a notion of compensation is implicit in the call made in those resolutions that returning refugees should recover their assets.

103. Thus, in numerous resolutions adopted by the General Assembly with regard to the population transfer and implantation of settlers in Cyprus 60/, the call was made for the return of all refugees to their homes in safety and to settle all other aspects of the refugee problems. They should be able to recover their former assets, in particular their homes and other land owned by them at the time of their departure. In any assessment of compensation, it is

important to keep in mind that the situations giving rise to population transfer vary enormously and it is not inconceivable that compensation might operate to the detriment of the rest of the population who have remained in the country but who are innocent of the activities of the "criminal regime" that caused the population transfer. Thus, for example, a compensation claim on behalf of those who were transferred from South Africa by the former apartheid regime would today constitute a burden against the whole population of South Africa.

104. The last point on compensation is that after an extensive review of practice and doctrine, the Commission came to the conclusion that "economically assessable damage" covers, inter alia, damage caused to the State through the persons, physical or juridical, of its nationals or agents (so-called "indirect" damage) to the State. According to the commentary, this class of damage embraces both the "patrimonial" loss sustained by private persons, physical or juridical, and the 'moral' damage suffered by such persons. 61/

105. It must be pointed out, however, that although the injury is caused to private persons, the ILC draft views the responsibility relationship within an exclusively inter-State model. The standing of the individual to obtain effective remedies against other States, including his own, is essentially outside the scope of State responsibility, as codified by the ILC. As indicated above (at para. 88), the entitlement of the individual to obtain reparation (including compensation) is still unclear.

106. This is mainly the case because human rights treaties are implemented through national legislation. In addition, only when such treaties include provisions allowing individuals to seek a remedy from an international body does the relationship go beyond the confines of domestic law. It is, of course, encouraging that out of 126 States parties to the International Covenant on Civil and Political Rights, 76 have accepted the Optional Protocol. The Human Rights Committee, which has interpreted broadly the provisions of the Covenant that have a bearing on compensation (arts. 9 (5) and 14 (6)), and relying on article 2 (3), which provides that an individual whose rights under the Covenant have been violated must be given an effective remedy, has not hesitated, e.g. in the case against Paraguay, from stating that the State was under an obligation "to provide effective remedies to the victim". 62/

107. Again, one may discern a nebulous protection under the European Convention of Human Rights (art. 50) which stipulates that the Court shall, "if necessary, afford just satisfaction to the injured Party" on condition that the international law of the defendant State allows only partial reparation to be made for the consequences of the unlawful conduct complained of and found to exist.

108. Similarly, the American Convention on Human Rights makes it incumbent on the Inter-American Court to rule, "if appropriate", that the consequences of the measure or situation that constituted the breach of such a right or freedom be remedied and that fair compensation be paid to the injured party.

109. At any rate, while the law of human rights is in constant development by these bodies, it would not escape the reader that, whether in the Covenant or in regional treaties, too much discretion is left to the appropriate body to allow for an entitlement of individuals to be sought with the necessary certainty.

110. Reverting to the forms of reparation, it may be observed that in addition to cessation, restitution in kind and compensation, the injured State is entitled in certain circumstances 63/ to obtain satisfaction, which is the third form of reparation. Satisfaction may take a number of forms: an apology, nominal damages, damages reflecting the gravity of the injury, and disciplinary action and/or punishment of officials or private persons when the wrongful act arises from serious misconduct of private persons or criminal conduct by officials.

111. Satisfaction is an exceptional remedy and strongly affects the domestic jurisdiction of the wrongdoing State, while, arguably, the responsibility relationship is still delictual and not criminal - even when satisfaction is provided for as a remedy. Satisfaction carries an "afflictive nature" and borders on the consequences normally associated with crimes. Given the fact that it can be, and has been, abused by strong States, 64/ the Commission sought to guard against such abuse by providing, in paragraph 3 of article 10, that the right to obtain satisfaction "does not justify demands which would impair the dignity of the State which has committed the initially wrongful act". While not unaware of the possible abuse of the remedy of satisfaction, the fact that it contemplates disciplinary sanction against criminal officials is welcome from the point of view of affording greater protection to human rights victims. Lastly, if the consequences of crimes should be developed fully by the Commission, it is likely that the exception contained in paragraph 3 of article 10 may be limited or eliminated.

112. The fourth and last remedy for an internationally wrongful act is assurances and guarantees of non-repetition. 65/ Under this remedy, certain conduct may be required of the wrongdoing State, e.g. the adoption or abrogation of specific legislative provisions. Thus, for example, in the case against Uruguay, the Human Rights Committee, in addition to demanding compensation for the victim, expressed the view that Uruguay is under "an obligation ... to take steps to ensure that similar violations do not occur in the future." 66/

113. We have dealt so far with the so-called "substantive" consequences of an internationally wrongful act. Given the lack of an effective international machinery to obtain the remedies dealt with above, an injured State may have to resort to unilateral countermeasures to compel compliance with the obligation breached. Such countermeasures, also known as reprisals, are treated in the International Law Commission's draft under the heading of "instrumental consequences".

114. Countermeasures are a controversial concept. By their nature, they are forms of self-help detrimental to the progress of the international society towards the institutionalization of the rule of law at the international plane. On the other hand, they constitute, in many cases, the only available sanction to ensure compliance with international law obligations. Although

the development of the concept is still at an early stage in the draft, it can be discerned that while the Commission will include the concept in the draft - thus recognizing the legitimacy of an unpleasant, but all-too-often resorted to, measure in international relations - it will do so under conditions aiming at regulating their operation so as to reduce the possibilities of abuse by linking them to settlement of disputes procedure; imposing a limitation of proportionality on their operation; and prohibiting certain countermeasures. 67/ What concerns us in particular in the area of prohibited countermeasures is the protection (contained in draft art. 14 proposed by the Special Rapporteur) that

> "An injured State shall not resort, by way of countermeasure, to:
>
> "...
>
> "(c) any conduct which
>
> "(i) is not in conformity with the rules of international law on the protection of fundamental human rights." 68/

115. Thus, the mass expulsion of populations by way of countermeasures to an earlier population transfer, or indeed by way of countermeasure, to a breach in a different area of obligation is prohibited.

116. The question may arise whether the well-known cases of forcible population transfer treaties could not be viewed as legitimization of a process of countermeasure ex post facto, or during the process of population transfer. In view of the absolute prohibition of such transfers under the draft article, which reflects the fact - according to the fourth report of the ILC's Special Rapporteur - that limitations to the right of unilateral reaction to intentionally wrongful acts have acquired in our time, thanks to the unprecedented development of the law of human rights, a degree of restrictive impact which is second only to the condemnation of the use of force, it is now more doubtful that such treaties would, in our time, be valid.

117. So far, the responsibility relationship has been dealt with from a bilateral perspective. It is often the case, however, that the rights of more than one State might be infringed, either equally or differentially (indirectly). Apart from the principal victim, other States may be called differentially injured in view of the fact that the breach is of an erga omnes obligation and it should be remembered that human rights violations are violations by definition of erga omnes obligations. In such cases, it seems that there is a right to ask for cessation and guarantees of non-repetition with a view to the pursuit of the common interest affected by the breach. It is doubtful that States other than the principal victim may ask for pecuniary compensation. They may, according to some writers, ask for restitution in kind. The situation becomes problematic when the principal victim accepts compensation instead of restitution in kind. Should other States insist on restitution in kind? Equally problematic is the "faculty" to resort to countermeasures when the principal victim has accepted restitution in kind, or compensation. To allow for this would mean never-ending disputes and the

subjugation of the wrongdoing State to impossibly severe consequences, but to deny them would be to reduce the responsibility relationship to a bilateral contest, when community interests are clearly breached.

118. The problem becomes more complicated as the breach moves from delictual responsibility to a criminal one. It is too early to tell what solution the Commission will ultimately adopt, but it can be argued that, as the seriousness of the breach increases, it is reasonable that bilateralism of the responsibility relationship should be reduced. Thus, in a situation of population transfer amounting to a crime, the fact that the principal victim accepted compensation should not, in principle, bar other States from insisting on restitution in kind and satisfaction, including the punishment of the criminal officials.

119. In the case of crimes, there is always a plurality of States for, by definition (under art. 19 of Part I), a crime is an internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental rights of the international community that its breach is recognized as a crime by that community as a whole.

120. Among the list of crimes contained in article 19, subparagraphs (b) and (c) of paragraph 2 speak of a serious breach of the right of self-determination, such as the establishment or maintenance by force of colonial domination, and a serious breach of the rights of the human being, such as slavery, genocide and apartheid.

121. Who should decide whether a crime exists is an equally difficult problem. Initially at least, the principal victim would do so. At any rate, it would have to qualify the action as a wrongful action. Ideally, of course, the International Court of Justice should do so, but its ability to do so is impaired by the essentially voluntary basis of its jurisdiction. The Security Council could be empowered to do so provided its determination is subject to judicial scrutiny and review by the International Court. The solution chosen will lie more in the realm of progressive development than of codification of existing law.

122. The existence of these possibilities highlights the complexity of the problems involved in delineating the consequences of international crimes. At this stage of the Commission's work, it is difficult to come to any final conclusions.

123. This notwithstanding, it is possible, on the basis of this discussion of State responsibility, to arrive at the following tentative conclusions:

1. The individual entitlement to seek effective remedies directly is still at a nascent stage of development. Even when such remedies may be obtained, e.g. under the Optional Protocol to the International Covenant on Civil and Political Rights, there is no certainty of the remedies.

2. The rules of State responsibility may operate to fill this gap in the protection of human rights. Their main disadvantage, however, is that they operate at the inter-State level and have been designed to include all

wrongful acts, not only human rights violations which may require a differentiated regime to take into account the complexity of the situations created by human rights violations, e.g. the flexibility with regard to the remedy (compensation rather than restitution in kind) may have to be restricted in the case of human rights violations.

3. Mass forcible population transfer appears in certain circumstances to qualify as an international crime carrying all the consequences of crimes. These consequences have still to be worked out with greater clarity by the International Law Commission.

4. In other circumstances, such transfers, while not crimes, nevertheless constitute ordinary wrongful acts. This part, more developed by the ILC, has been described in greater detail in this chapter.

5. In yet different situations, a population transfer may be carried out in situations when responsibility is precluded, e.g. compelling national interest or military necessity. Such transfer nevertheless causes injurious consequences to the population or group in question. As a matter of equity, innocent victims should not be left to bear their loss alone. A responsibility for injury, rather than fault, could be contemplated, but this will cause an infusion of a greater amount of progressive development than most States are ready for. This point will be elaborated in the final report.

VII. CONCLUSIONS AND RECOMMENDATIONS

A. Summary

124. Whereas the preliminary report (E/CN.4/Sub.2/1993/17 and Corr.1) sought to review the phenomenon of forcible population transfer in a comprehensive manner, the present report concentrates on specific areas with the aim of appraising the normative structure applicable to population transfer from the twin perspectives of international law and human rights. It describes first of all the normative structure of international law and human rights, and argues that human rights standards are useful in defining the conduct of States in the protection of populations against arbitrary displacement as well as in the course of displacement.

125. Secondly, the report deals with the question of legality of population transfers, and it has been suggested that, as a general proposition, international law prohibits the transfer of persons and the implantation of settlers. The governing principle is that the transfer of populations must be done with the consent of the population involved.

126. Furthermore, in part II the unlawfulness of population transfer has been described where its purpose or effect constitutes or amounts to genocide, torture and its related elements, slavery, racial and systematic discrimination, and interference with the legitimate exercise of the right to self-determination. On the other hand, the report describes, permissive standards of international law would justify population transfer. The limits of these derogations have been described as well. Part II also describes the subject of transfer of populations in its internal and international aspects. Concerning the former, it is evident that article 12 (3) of the International

Covenant on Civil and Political Rights (the principle of freedom of movement) prevails. Concerning the latter, article 12 (2) (the right to leave and to return to one's own country) is the guiding principle, together with the emerging right to remain.

127. Although both provisions of article 12 are indeed derogable rights, it has been submitted in part III that the basic problem is that states of emergency, under which population transfers often occur, are invoked frequently and last longer than necessary and also that a certain conduct is required of the State during the state of emergency.

128. Concerning population transfer and economic, social and cultural rights, which is described in part IV, it is submitted that the non-realization of such rights may provoke mass population movements.

129. Part V deals with population transfer and armed conflict, and describes that the general standards applicable to conflicts of both an internal and international character prohibit the forced relocation of civilians. It also examines some arguments that have been used to justify population transfer and the implantation of settlers.

130. Part VI finally discusses the subject of State responsibility and population transfer, and reflects the important work of the International Law Commission on State responsibility. On the premise that population transfer is an internationally wrongful act, the consequences and responsibilities of States committing such wrongful acts are described. Existing gaps in the protection of individual victims are alluded to as is the impact of these gaps on remedies. A preliminary appraisal of the effects of the development of the notion of criminal responsibility for the consequences of population transfer as an internationally wrongful act is also mentioned.

B. Conclusions

131. International law prohibits the transfer of persons, including the implantation of settlers, as a general principle. The governing principle is that the transfer of populations must be done with the consent of the population involved. Because the transfer of populations is subject to consent, this principle reinforces the prohibition against such transfer. The transfer of a population and the implantation of settlers and settlements is forcible if it is done without the consent of a given population. Thus, the criteria governing forcible transfer rest on the absence of consent and may also include the use of force, coercive measures, and inducement to flee.

132. Forcible population transfer, save in areas when derogation or military necessity permits, are prima facie internationally wrongful acts. In circumstances when the purpose or method of transfer constitutes genocide, slavery, racial or systematic discrimination and torture, the transfer may qualify as a crime within the meaning of article 19 (part I) of the International Law Commission's draft articles on State responsibility and carry all the consequences for internationally wrongful acts and, in addition, those normally associated with crimes. Within this purview fall acts such as

"ethnic cleansing", dispersal of minorities or ethnic populations from their homeland within the State, and the implantation of settlers amounting to the denial of self-determination.

133. Less grave actions of population transfer, while not amounting to crimes, may qualify as internationally wrongful acts; thus, the State engaged in such actions is under the obligation of cessation and reparation. Its responsibility is delictual. Other States may react through countermeasures to compel compliance by the first State of its obligations. Such reactions (countermeasures) are carefully circumscribed to prevent abuse and escalation and to ensure that the reaction does not violate fundamental human rights.

134. Population transfers may be permissible on the basis of certain exceptions which require justification and carry corresponding obligations regarding conduct during the process of transfer and reparation afterwards. Although the exceptions may be used to justify population transfer in specified cases, they do not alter the fact that population transfers undertaken pursuant to such exceptions remain forcible transfers. Because of the precise formulation of the restrictions pertaining to freedom of movement and the right to leave and return to one's own country (art. 12 (3) of the International Covenant on Civil and Political Rights), and if indeed restrictions are exceptions, then the proposition that relocation, displacement and transfer of populations are subject to justification is reinforced. Consequently, restrictions have to be strictly construed and justified objectively by reference to the public interest grounds on which they are permissible.

135. Assuming that population transfer without consent can be considered as an internationally wrongful act under international law, a basis for a working definition of the term "forcible transfer" of populations can be laid down. In this respect, the basis of wrongfulness can be determined by reference to consent, or the lack of it, because it is the organizing general principle with status in customary international law.

136. Lack of consent as a basis for establishing internationally wrongful acts must be related to international law because it is not absolute and certain exceptions permit population transfer provided that resort to the exception in question is justified in international law. Accordingly, it is proposed that the term "forcible transfer" of populations shall refer to the settlement, relocation or displacement of a population without its consent for whatever purpose and by means contrary to international law.

137. In situations where population transfer is not unlawful, damage occurs nevertheless to the transferred group and it ought, as a matter of equity, to receive compensation. An innocent victim should not be left to bear his loss alone. This criterion will be developed in the final report with special emphasis on the World Bank standards. 69/

138. Amongst the remedies contained in draft articles 6-10 on State responsibility, attention was focused on cessation and reparation. The relationship of the two forms of reparation - restitution in kind and compensation - leaves no doubt as to the primacy of restitution in kind. The practice of international organs with regard to conflicts such as those in the

Middle East, Cambodia, Cyprus and Afghanistan confirms that restitution in kind is normally demanded in the form of repatriation. Compensation is either explicitly mentioned, as in the case of the Palestinian refugees, or implicit in the language of the resolution referring to other conflicts.

139. In deciding on restitution or compensation, an injured State - under the ILC draft - has a wide margin of discretion (art. 6). The possible detrimental effects that this discretion may have on the protection of victims of human rights violations, especially of mass population transfer, become apparent when one considers that poor or weak Governments may be tempted to substitute repatriation by compensation.

140. Population transfer at the international level creates a trilateral relationship: the wrongful State, the victim State and the victim individuals. While international responsibility is essentially an inter-State relationship and the damage to persons is "recoverable" by the State as indirect injury, the rights of individuals to seek remedies seem still to be curtailed by the fact that human rights treaties are entered into by Governments; by the fact that many of them do not contain procedural rules on remedies and by the fact that even when such remedies (of addressing international forums) exist, the entitlement of individuals to obtain remedies is still at a nascent state of development.

C. Recommendations

141. Although a tentative definition of what constitutes a forcible transfer is offered in this study, more effort should be devoted to its elaboration, along with the criteria accompanying it. For instance, in addition to a general definition, it is possible to craft acts which constitute forcible transfer.

142. Of more importance is for future work to be directed at elaborating a regime which clarifies and improves the existing standards and the responsibility of States in the area of population transfer and the implantation of settlers. At present, the standards are scattered and can be taken advantage of by recalcitrant States seeking to evade their application. Moreover, advantage must be taken of the momentum generated by the International Law Commission in its work on State responsibility with the aim of identifying a differentiated regime that better reflects the exigencies of wrongful acts qualified as human rights violations and the complexity of the situations they create which may sometimes not respond to the simple recipes of international law. As a starting point it is recommended that the Sub-Commission begins work towards a draft declaration on the subject of forcible population transfers and the implantation of settlers and settlements. It would be worthwhile in this respect to further analyse the World Bank guidelines on involuntary resettlement. 70/

143. The Special Rapporteur recommends that the organization of a multidisciplinary expert seminar on the human rights dimensions of population transfer, including the implantation of settlers and settlements, which has been recommended by the Sub-Commission in its resolution 1993/34 and endorsed

by the Commission on Human Rights in its decision 1994/102, be held in November 1994, in order to allow him time for the preparation of the final report which would conclude the present study.

144. The Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms in his final report (E/CN.4/Sub.2/1993/8) has proposed basic principles and guidelines which would strengthen the right to reparation for victims of gross violations of human rights. In its resolution 1993/29, the Sub-Commission has decided to examine further these principles and guidelines, and for this purpose to establish, if necessary, a sessional working group at its forty-sixth session. The author of the present study urges the Sub-Commission to do so as this would not only help to fill an existing gap in international human rights law but also would assist in further refining solutions to the tragic situation of displaced people.

Notes

1/ For evidence, see Restatement of the Law: Third Statement of US Foreign Relations Law, Vol. 2 (1987), p. 165; David Harris, Cases and Materials in International law, 4th ed., (London, 1991) p. 695; Barcelona Traction Case, ICJ Reports 1970, p. 32.

2/ See article 11 of the Convention on the Prevention and Punishment of the Crime of Genocide.

3/ See Gita Welch "The prohibition of torture, cruel, inhuman and degrading treatment or punishment in international law", D. Phil. thesis, Oxford, 1993.

4/ UNHCR, Note on Certain Aspects of Sexual Violence Against Refugee Women (A/AC.96/822), 12 October 1993; Guidelines on the Protection of Refugee Women (Geneva, 1991).

5/ Res. 44/2, Annuaire 138 (1952).

6/ Convention concerning Indigenous and Tribal Peoples, 1989. This is Convention No. 169 which revises the provisions of the earlier Indigenous and Tribal Populations Convention, 1957 (No. 107).

7/ Article 16, Convention No. 169.

8/ Although the term compensation generally means compensation in kind or pecuniary compensation, when the restoration of the status quo ante is materially impossible, it has been used, erroneously, to mean restitution in integrum. (For a fuller treatment of the subject, see part V.)

9/ Jennings, Acquisition of Territory in International Law (1963).

10/ Brownlie, Encyclopedia on African Boundaries (London,1979) pp. 20, 215.

11/ Beyani, Restrictions on Internal Freedom of Movement and Residence in International Law, D.Phil thesis, Oxford, 1992.

12/ The Inter-American Commission held, in the Miskitos case, cited supra that refusal by Nicaragua to allow the return of Miskitos to their previous lands upon expiry of the state of emergency would amount to restriction of movement and choice of residence.

13/ Decision No. 24/1977 Selected Decisions of the Human Rights Committee under the Optional Protocol (CCPR/C/OP/1), 1985.

14/ 57 Australian Law Reports 472 (1985).

15/ ILO Convention No. 169.

16/ Advisory Opinion on the meaning of the word "Laws" in article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86 of 9 May 1986.

17/ C. Beyani, "Restrictions on internal freedom of movement and residence in international law", D.Phil. thesis, Oxford, Chapters Five and Six.

18/ Sandra Lovelace v. Canada, see note 13 supra.

19/ Opinion of Judge Lauterpacht in the Guardianship case, ICJ Reports 1958 at pp. 25-26.

20/ Guy Goodwin-Gill, International Law and the Movement of Persons Between States (Oxford, 1978), p. 262.

21/ Article 14, Universal Declaration of Human Rights, 1948; Convention relating to the Status of Refugees, 1951 and its Protocol, 1967; Convention governing the Specific Aspects of Refugee Problems in Africa, 1969; and the Cartagena Declaration on Refugees, 1984.

22/ Ibid.

23/ UNHCR, The State of the World's Refugees: The Challenge of Protection (Penguin Books, 1993) pp. 31-49.

24/ Council of Europe, Activities of the Council of Europe in the Field of Migration (Strasbourg, 1993) p. 45.

25/ See paras. 16-24.

26/ Under article 4 of the International Covenant on Civil and Political Rights, these standards are: the principle of the existence of an exceptional threat to the life of the State; the principle of official proclamation of a state of emergency; the principle of notification of other States of the existence of a state of emergency; the principle of proportionality of the extent of derogation to the nature of the threat; the principle of non-discrimination in the derogation of rights; and the principle of consistency of the measures of derogation with a State's international obligations.

27/ Inter-American Commission on Human Rights, report on the situation of human rights of a segment of the Nicaraguan population of Miskito Indians, Doc. 10, Rev. 3, 29 November 1983, p. 21.

28/ Ibid., p. 46.

29/ See the final report of the Special Rapporteur of the Sub-Commission on the realization of economic, social and cultural rights (E/CN.4/Sub.2/1992/16), pp. 26-28.

30/ Committee on Economic, Social and Cultural Rights, General Comment No. 3 (1990), para. 1.

31/ See, among others, World Bank Operational Directive 4.30 on Involuntary Resettlement (29 June 1990). For a more complete overview of the subject, see paras. 337-346 of the preliminary report (E/CN.4/Sub.2/1993/17).

32/ See also Greg, "The underlying principles of international humanitarian law" Australian Yearbook of International Law, pp. 46-112 and Cassese (ed.), The New Humanitarian Law of Armed Conflict (Naples, 1979).

33/ For the meaning, see Umozurike, "Protection of the victims of armed conflicts", in: Cassese, ibid., pp. 188-199.

34/ Plattner, "The protection of displaced persons in non-international armed conflicts", 291 International Review of the Red Cross 567-580 (1992).

35/ Theodor Meron, Human Rights and Humanitarian Norms as Customary Law (Oxford, 1991) p. 45.

36/ David Harris, Cases and Materials on International Law, p. 201.

37/ Jennings, Acquisition to Title in International Law, p. 55. Akehurst, in his book, A Modern Introduction to International Law 6th ed. (1987) at p. 149, concluded that any threat or use of force, whether it is in contravention of the Charter or not, invalidates acquisition to territory.

38/ Yehuda Z. Blum, Secure Boundaries and the Middle East Peace In the Light of International Law and Practice, (Jerusalem, 1971) pp. 63-109.

39/ Jennings, op. cit., p. 55.

40/ See, for example, Security Council resolution 242(XXII) of 22 November 1967, in which the Council emphasized the inadmissibility of the acquisition of territory by war.

41/ See 1 Common Law Report 175 (1992).

42/ For a discussion of these issues, see Emma Playfair, Administration of Occupied Territories in International Law (Oxford, 1991).

43/ International Law Materials (1978) 777-779.

44/ Paragraph 1 of article 49 prohibits "forcible" transfers of protected persons out of the occupied territory; paragraph 6 is not so limited.

45/ E/CN.4/Sub.2/1993/17, para. 324.

46/ Report of the International Law Commission on the work of its forty-ninth session (A/48/10), pp. 132-142.

47/ PCIJ, Series A, No. 9, p. 21.

48/ Ibid., No. 17, p. 47.

49/ Article 6 bis, A/48/10, pp. 142-151.

50/ Article 7, A/48/10, p. 151.

51/ Brian v. Chamorro Treaty Case (Anales de la Corte de Justicia Centroamericana), vol. VI, Nos. 16-18.

52/ See C.D. Greg, Judicial Remedies in International Law, Oxford, 1987.

53/ A/48/10, p. 155. The opening words of article 7 read: "The injured State is entitled to obtain from the State which has committed an internationally wrongful act restitution in kind ...".

54/ Frelick, "The Right of Return", International Journal of Refugee Law 442, 443 (1990). Cited in Donna E. Arzt and Karen Zugaib, The New York University Journal of International Law and Politics, vol. 24 (399), p. 1440.

55/ A/48/10, pp. 163-168.

56/ A/48/10, pp. 116-117.

57/ A/48/10, p. 167.

58/ For a fuller treatment, see Donna Arzt and Karen Zagaib cited supra, note 54.

59/ The Special Rapporteur is grateful to Professor Christian Tomuschat for providing him with the text of his paper, "State responsibility and the country of origin", presented at the colloquium organized by the Graduate Institute of International Studies and UNHCR on "The problem of refugees in the light of contemporary international law issues" (Geneva, 26-27 May 1994), in which this question is addressed in greater detail.

60/ E.g. resolutions 3395 (XXX) of 25 November 1975, resolution 34/30 of 20 November 1979 and 37/253 of 13 May 1983, and Commission on Human Rights resolution 4 (XXXII) of 13 February 1975.

61/ A/48/10, pp. 180-181.

62/ The line of reasoning of the Committee has, however, been criticized on the grounds that remedy does not correspond to the French and Spanish texts: recours and recorso. See supra, note 60.

63/ Article 10, A/48/10, p. 143.

64/ A/48/10, p. 209.

65/ Article 10 bis, ibid. p. 210.

66/ Decision of 23 July 1980, para. 19 Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 40. (A/35/40).

67/ Fourth report on State responsibility (A/CN.4/444 and Add.1-3).

68/ A/CN.4/444/Add.1, p. 22.

69/ Operational Directive 4.30: Involuntary Resettlement of 29 June 1990. In a press release of 8 April 1994, the World Bank has stated that major multilateral and bilateral donors have recently adopted resettlement guidelines similar to those of the Bank.

70/ See supra, note 69.